UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Trinity Health-Michigan, d/b/a
St. Joseph Mercy Oakland Hospital,

Respondent

and

CASE: 07-CA-161375

Council 25, Michigan American
Federation of State, County and
Municipal Employees (AFSCME),
AFL-CIO

Charging Party

_____/

RESPONDENT'S REPLY IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Submitted by:

Clark Hill PLC

Daniel J. Bretz (P34334)
Brian D. Shekell (P75327)
500 Woodward Avenue – Suite 3500
Detroit, Michigan 48226
(313) 965-8300
dbretz@clarkhill.com
bshekell@clarkhill.com
Attorneys for Respondent
Trinity Health-Michigan
d/b/a St. Joseph Mercy Oakland Hospital

INTRODUCTION

The Response Briefs fail to set forth any legal or common sense argument showing that St. Joseph Mercy Oakland Hospital violated Sections 8(a)(1) and (5) when it followed the dictates of the contract and excluded newly created licensed jobs. The contract unmistakably required that licensed jobs be excluded from the bargaining unit. The Hospital did not act unilaterally. It did not violate the contract or refuse to bargain. It followed the contract and honored the parties' bargain by "excluding … licensed associates" from the bargaining unit.

The General Counsel and Union re-label and mischaracterize the Hospital's adherence to the contract's required exclusion of "licensed associates," as a *unilateral removal* of *existing and covered* work. This is a faulty premise, belied by the undisputed facts. The State of Michigan made it illegal for pharmacy technician work to be performed by unlicensed individuals. A new position of Licensed Pharmacy Technician was created with new job requirements, including the maintenance of a state issued license. The licensed position was excluded by clear contract language. The Hospital did not unilaterally "remove" an unlicensed job from the unit.

Any inclusion of these licensed technicians within the bargaining unit was plainly prohibited by the collective bargaining agreement. Abiding by the dictates of the contract is not, by definition, an unlawful or unilateral act.

The Responses also disregard the record evidence in asserting that the underlying unfair labor practice charge was timely filed. The parties agree that the Section 10(b) limitations period began to run when the Union had *clear and unequivocal notice* of the alleged violation. The Union admits that it had clear notice nearly one year before it filed its charge: "Here, the Union does not dispute that Respondent informed it that it would violate the Act in late 2014."

(AFSCME Resp at 8). Despite this knowledge, the Union waited nearly a year, until October 5, 2015, to file a charge claiming a violation of the Act.

Contrary to the assertions of the General Counsel, there is no sound legal or other reason for the Board to apply differing standards for Section 10(b) requirements depending on whether the underlying charge asserts a violation of Section 8(a)(3) or 8(a)(5). This artificial distinction is without basis in law or logic.

ARGUMENT

I. The Union's Undisputed Actions Conclusively Establish That It Had Clear Notice Of The Unfair Labor Practice More Than Six Months Before The Charge Was Filed

The parties do not dispute that the limitations period for filing an unfair labor practice charge begins to run when a party has "clear and unequivocal notice" of a violation of the Act. (GC Resp at 11; AFSCME Resp at 7); See *Leach Corp.*, 312 NLRB 990 (1993). The Union admits that it had such notice in "late 2014" that the Hospital would allegedly "violate the Act." (AFSCME Resp at 8). The Responses fail to cite any authority where the charging party admitted to having clear and unequivocal notice of an allegedly illegal act but was permitted to disregard the six-month limitations period. The primary case relied on by the ALJ and cited by the General Counsel and Union, *Leach Corp.*, 312 NLRB 990 (1993), does not support this position.

In *Leach*, the Board cited the correct standard that should have been applied by the ALJ: "It is also firmly established that the 10(b) period begins to run when the party has clear and unequivocal notice of a violation of the Act." *Id.* at 805. Contrary to the ALJ's holding, it is not the date of implementation or the effective date of the action that starts the time period to run. The facts in *Leach*, however, are radically different than those present here.

In *Leach*, the union filed a charge alleging that the employer failed to adopt the collective bargaining agreement at a new plant after it transferred a number of workers to the new location.

The employer claimed that the charge alleging contract repudiation was not filed until more than six months after the union was given notice of the plant closure and relocation. The Board held that the mere notice of the closure and relocation was not sufficient notice of a violation of the Act. Rather, under the law of contract repudiation there were facts that had to be developed and events that had to be solidified, one way or another, before clear notice of a violation was present. There would not be a legal duty to recognize the contract unless a "substantial percentage" of employees from the old location were transferred to the new plant. A charge alleging a repudiation of the contract would not be ripe until the union knew that a substantial percentage of bargaining unit employees would be transferred to the new location. When the employer made its initial announcement, the union did not know how many employees would be transferred, let alone whether there would be a "substantial percentage." The mere announcement of a relocation was not a clear notice of a violation of the Act.

This case is materially distinguishable from *Leach.* Here, the Union's Response admits that clear and unequivocal notice of the alleged violation was given outside of the six month period. There were no facts that needed to be developed. Nothing was unclear or ambiguous about what was going to happen. State law required that Pharmacy Technicians must become licensed. The labor contract excluded "licensed associates." The Hospital told the Union on October 20 2014, and on several occasions thereafter, that upon licensure, Pharmacy Technicians could not be included in the bargaining Unit. The Union admits that it received this notice nearly a year before filing the charge.

United States Postal Service Marina Mail Processing Center, 271 NLRB 397, 400 (1984), supports the longstanding principle, reaffirmed by *Leach*, that a party cannot be provided clear and unequivocal notice of an alleged violation of the Act and then wait for the injury to

take place. The time period for filing a charge under Section 10(b) begins upon clear and unequivocal notice of the action, even if the implementation or effects of the action occurs on a later date. Based on Supreme Court precedent, the Board held the applicable limitations period begins to run on the date "the operative decision was made—and notice given—in advance of the designated date on which" the adverse employment action occurs. *Id.* at 399, quoting *Chardon* v *Fernandez*, 454 US 6, 8 (1981). The Board held it would "…henceforth focus on the date of the alleged unlawful act, rather than on the date its consequences become effective, in deciding whether the period for filing a charge under Section 10(b) has expired." *Id.* at 399-400.

Here, there were no less than six separate events that took place outside of the six-month limitation period where the Union admitted that it had clear and unequivocal notice of the Licensed Pharmacy Technician position exclusion. AFSCME concedes that it was first given notice of the allegedly wrongful act on October 20, 2014. (AFSCME Resp at 8). The record evidence identifies several other admissions by the Union that it had clear and unequivocal notice of the exclusion of the Licensed Pharmacy Technician position. Most telling is that on March 10, 2015, AFSCME filed a grievance challenging the exclusion of licensed pharmacy technicians. This grievance was filed nearly seven months before the unfair labor practice charge making identical allegations. The ALJ committed error in finding this charge to be timely.

There is no basis for the Union's argument that the Board should apply different time limitations standards for Section 8(a)(3) and (a)(5) violations. The Board in *Leach* did not state that a different standard should be applied in all 8(a)(5) cases. Rather, the Board pointed out in a short footnote that the charge involved a unique claim of contract repudiation which required factual development. Such a charge does not ripen upon notice of the plant relocation, but only when a "substantial percentage" of employees are transferred to a new location. The Board

stated, "The 10(b) standard that was employed in *Postal Service* applies to discriminatory discharge cases, but not to situations like those at issue here, involving contract repudiation and refusal to bargain." *Id.* at 991, n.7. This holding, however, affirmed that in all cases, whether under Section 8(a)(3) or (a)(5), "[i]t is … firmly established that the 10(b) period begins to run when the party has clear and unequivocal notice of a violation of the Act." *Id.* at 991.

The footnote in *Leach* did not create a separate rule for 8(a)(5) cases. It emphasized that the "firmly established rule" may be fact dependent where there is a specific charge of contract repudiation. *Leach's* holding was expressly limited to this type of claim and the specific facts of that case, i.e., "situations like those at issue here, involving contract repudiation…" [1]

The *Leach* Board did not ground a new 10(b) limitations standard for 8(a)(5) violations in the statutory provisions of the Act or Board precedent. At most, it articulated a standard uniquely suited to the specific facts in that case. To the extent that *Leach* has been cited as creating a new and different standard for 8(a)(5) cases, this interpretation should be clarified and overruled.

The General Counsel and Union also cite to inadmissible settlement discussions that took place within the six-month limitation period. These statements, made not by the Hospital but by a Federal Mediator as a proposed resolution to settle several outstanding grievances and unfair labor practice charges, should not have been admitted into evidence under FRE 408. The references by the Mediator to a potential "package deal" settling all claims, including the instant charge, proved fruitless in the end. AFSCME rejected the settlement offer. (Tr. 49). Regardless,

[1] As the Court of Appeals stated, "an employer's stated intent not to bargain following a plant relocation is insufficient standing alone to constitute an unfair labor practice. Rather, additional action must be taken and information obtained in order to determine the employer's genuine obligation and the employees' future rights." *Leach Corp., v NLRB,* 311 US App DC 398, 402, (DC Cir 1995).

these settlement discussions do not change the fact that the Union had clear knowledge in late 2014 of the facts and circumstances that formed the basis of its Charge filed on October 5, 2015.[2]

Notably, the ALJ did not rely on the settlement statements by the Federal Mediator. Instead, the ALJ erroneously looked to the date that the decision was implemented, rather than the date of notice of the decision, as the date that the Section 10(b) period began to run. The ALJ acknowledged in her opinion that "[t]he 10(b) period begins to run when the aggrieved party has clear and unequivocal notice of a violation." Despite this correct statement of the law, the ALJ incorrectly focused not on the date of notice, but on the fate of implementation of the decision. The ALJ stated, "October 1, 2015, is the date that the pharmacy technicians were excluded from the bargaining unit; and the point at which Respondent discontinued deducting their union dues. The charge in this case was filed 4 days later, on October 5, 2015, well within the 6-month time period established in Section 10(b) of the Act." (ALJ Decision at p. 9). This is error under *Postal Service* and *Leach*.

II. The ALJ Erroneously Analyzed This Case As A Voluntary Removal Of Bargaining Unit Work

The Responses fail to identify any legal authority where an employer commits a violation of the Act by adhering to the express terms of the parties' collective bargaining agreement. The

[2] AFSCME's reliance on *Zurich American Ins. Co. v. Watts Industries, Inc.*, 417 F.3d 682 (7th Cir. 2005), for the proposition that the settlement discussions are admissible, is unfounded. As *Zurich* makes clear, a court may allow the admission of statements in settlement negotiation for reasons other than proving liability. *Zurich*, 417 F.3d at 688-89; AFSCME Resp at 9, fn 3. Here, AFSCME is attempting to use the settlement discussions to establish that the Hospital violated the Act by excluding the Licensed Pharmacy Technicians from the unit. *Zurich* prohibits this. The *Zurich* court also noted that settlement negotiations may be admissible if they relate to a dispute "distinct from the one for which the evidence is offered." *Id.* at 689. The discussions involving the Pharmacy Technicians related to several related issues addressed during settlement negotiations sponsored by a federal mediator arising out of grievances filed by AFSCME. (Tr. 45). The disputes discussed during settlement negotiations are interrelated and inadmissible under the Rules of Evidence.

ALJ erroneously characterized this case as involving a unilateral *removal* of a bargaining unit work. The Responses rely exclusively on this misguided interpretation and fail to rebut the Hospital's legally sound argument that it *followed* the collective bargaining agreement by excluding the Licensed Pharmacy Technicians.

The Union's reliance on *Gratiot Community* Hospital, 312 NLRB 1075 (1993), is misguided. In *Gratiot*, the parties' agreement contained exclusionary language for "supervisors within the meaning of the National Labor Relations Act." 312 NLRB at 1083. The union alleged that the employer unilaterally changed the scope of the unit when it removed nurses from the bargaining unit to non-unit supervisory positions. The Board held that even though some nurses met the statutory definition of "supervisor," they also met this definition at the time the contract was negotiated and the parties included these nurses in the unit. *Id.* The employer knew about the supervisory job duties the nurses performed at the time the contract was executed and nonetheless included them in the unit. *Id.* The employer could not thereafter change this bargain and remove these employees mid-term.

Here, the Pharmacy Technicians were <u>not licensed</u> at the time the CBA was executed. The state-mandated licensing requirement came into effect during the term of the contract and the exclusionary language in the recognition clause mandated that the Licensed Pharmacy Technician position not be included in the unit.

Texaco Port Arthur Works Employee Federal Credit Union, 315 NLRB 828 (1994) is also distinguishable. In *Texaco*, the collective bargaining agreement covered only hourly non-exempt workers. The employer made the unilateral decision to create a new allegedly "exempt" position of "loan officer" that would not be included in the bargaining unit. The employer claimed that the loan officers were "professional employees" exempt from coverage under the

Fair Labor Standards Act. The Board analyzed the job duties and found that these employees' work did not meet the definition of "professional employees" under the FLSA. The "loan officer" position was no different than the non-exempt "loan interviewer" job that was included in the unit. *Id.* at 831. Since the loan officers were not exempt under the FLSA, they were not properly excluded from the bargaining unit.

In *Texaco,* the claim of exclusion was based on a false factual premise that the employees were "exempt" under the FLSA. Here there is no dispute that the pharmacy technicians are "licensed associates" who must be excluded under the collective bargaining agreement. The Hospital did not rely on a false premise or mischaracterization of this job. The CBA requires exclusion of this job. The Union's reliance on *Texaco* is misplaced.

The findings by the Board in *Gratiot* and *Texaco* are based on the principle that an employer cannot take unilateral action that will "undermine the stability of the collective-bargaining relationship." *Gratiot, supra* at 1083. The Hospital honored the collective bargaining relationship and the parties' agreement. The passage of PA 285 made it illegal for the Hospital to employ unlicensed Pharmacy Technicians. This necessarily required that the Hospital create a new Licensed Pharmacy Technician position and employ only those who met its qualifications. All individuals who sought to be employed in the Licensed Pharmacy Technician position were asked to apply for the new position. (Tr. 206). Those who applied and met the requisite job qualifications were given formal offer letters. (Tr. 208).

After the passage of PA 285, the old Pharmacy Technician job was no longer viable or permissible. The old job became obsolete. Even if this obsolete job could be said to have been "removed" from the unit, *exclusion requires removal.* In other words, since licensed jobs must be excluded, they must also be removed from the unit.

The Hospital followed state law and adhered to the CBA by creating a new Licensed Pharmacy Technician position and not including it in the unit. Unlike the facts in *Gratiot* and *Texaco*, the new job classification was indisputably excluded from coverage as a matter of clear contract language, not as a result of a false characterization of otherwise covered work.

III. Even If The ALJ Conducted The Correct Legal Analysis, She Erred By Failing To Recognize The Future Effects Of Licensing

The ALJ's exclusive focus on the work performed by Pharmacy Technicians immediately after becoming licensed led to the erroneous finding that the work was not sufficiently "dissimilar." (ALJ Decision at pg. 11, lines 34-35). The ALJ failed to give any credit to the substantial impact that licensing regulations will have on the job duties of the Licensed Pharmacy Technicians. Had the ALJ done so, it is undisputed that the work of Licensed Pharmacy Technicians is materially distinguishable than the job duties of unlicensed Pharmacy Technicians.

Following the passage of Public Act 285, the job requirements for the pharmacy technicians are now set by the State of Michigan. (Tr. 96). These state-mandated job requirements have legally compelled significant changes in the pharmacy technician occupation. The licensing of pharmacy technicians "has elevated the profession" in multiple respects. (Tr. 94). The new licensing requirement has shifted the focus of the occupation to clinical care. The new clinical care focus resulting from the licensing requirement mandates that pharmacy technicians "are responsible for the outcomes of the medication use on the patient, the clinical process …and [the use of] personnel that are knowledgeable … in order to do this." (Tr. 95).

The licensing of pharmacy technicians permits them to operate in different areas of the pharmacy that they were not qualified to prior to licensing. (Tr. 94). Licensed Pharmacy Technicians at SJMO now conduct investigations into controlled drug discrepancies to determine whether there has been any unauthorized misappropriation of narcotics. (Tr. 112-13).

The State of Michigan licensing agency follows universal safety standards that must now be followed. Licensed Pharmacy Technicians are required to undergo retraining and recertification measures in order to ensure compliance with the USP 797 standards. (Tr. 92). This includes following different safety requirements for donning clothing and equipment; conducting sterile fingertip testing to ensure that there is no contamination in sterile compounding and IV rooms; and revised cleaning techniques that were not required prior to the licensing requirement. (Tr. 92-3, 107-08). Pharmacy Technicians must also now pass a criminal background check prior to licensing. (Tr. 114).

The ALJ noted that "several of the job changes that [Pharmacy Director Kathleen] Gaither identified are either anticipated or did not occur until months after the pharmacy technicians were licensed and removed from the bargaining unit. She also testified that the pharmacy technician would be able to perform the anticipated future responsibilities because they would occur under a difference job description." (ALJ Decision at pg. 11). The ALJ erred in looking only at whether there had been immediate changes in job duties and giving no credence to the undisputed evidence of the changes in duties and increasing professionalism that will be taking place over the next several months and years.

Even if this case were to be analyzed in the context of a *removal* of bargaining unit work, the record evidence establishes that the Licensed Pharmacy Technician position continues to develop in a way that makes the job duties sufficiently dissimilar from the unlicensed position. The ALJ erred in failing to credit this record evidence and should be reversed.

By: /s/ Daniel J. Bretz_____

Date: September 5, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that the forgoing document was filed with the National Labor Relations Board through the NLRB's Electronic Filing System, and served upon other counsel to this matter, as listed below, by electronic mail on September 5, 2017:

Renée McKinney
Counsel for the General Counsel
National Labor Relations Board , Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226
(313) 335-8033
Renee.McKinney@nlrb.gov

Robert Fetter
Counsel for the Charging Party
Miller Cohen, P.L.C.
600 West Lafayette Blvd., 4th Floor
Detroit, Michigan 48226
rfetter@millercohen.com

/s/Stephen A. Holmes
Stephen A. Holmes